artificial, it seems sufficient in law, for Thaw was committed to the asylum by court order, and the conspiracy alleged, was one to nullify the effect of that order.[10] The court decided that the indictment was faulty in not having set out the crime with legal exactness; but, under the principles above enunciated, the decision on these points should have been left to the courts of the demanding State. It seems, also, that error was committed in inquiring into the reasons for the escape to New Hampshire and into the motive prompting the officers of the demanding State to seek the petitioner's return. The main argument of the court in refusing to allow rendition, was based on the reasoning that the fact that Thaw escaped from a lunatic asylum showed him to be insane, and hence unable to commit a crime; but as this question involved his guilt, it should have been left to the courts of New York. Moreover, the fact that one has not sufficient understanding to comprehend the nature of the crime of murder, does not necessarily mean he is legally incapable of entering into a conspiracy to pervert and obstruct the due administration of the law.[20]

DISPLACEMENT OF STATE LAWS BY TREATIES.—Among the powers conferred upon the national government, the treaty-power appears to be one of the least appreciated as well as one of the most extensive.[1] The Constitution provides that "all Treaties * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[2] It is significant that under this clause no treaty has ever been declared unconstitutional.[3] That there are limits to the treaty-power is generally admitted,[4] but what those limits are has never been determined. The most frequent attempts to set such limits have been attempts to protect the reserved rights of the States from infringement by treaties. As long as the Supreme Court was led by John Marshall, it strictly followed the strong leading case of *Ware* v. *Hylton*,[5] and allowed no State law to stand in the way of any treaty.[6] But later, the personnel of the Court changed, and from then until the Civil War we find numerous dicta casting grave doubts

[10] *Cf.* People *v.* Hummel (1907) 119 App. Div. 153.

[20] *Cf.* Harrison *v.* Bishop (1891) 131 Ind. 161.

[1] Pomeroy, Introduction to Constitutional Law, 571.

[2] Art. VI, subd. 2.

[3] I Willoughby, Constitutional Law, § 211.

[4] See The Cherokee Tobacco (1870) 11 Wall. 616, 620; 2 Story, Commentaries on the Constitution (5th ed.) § 1508; Willoughby, Constitutional Law, §§ 216-219.

[5] (1796) 3 Dal. 199.

[6] Chirac *v.* Chirac (1817) 2 Wheat. 259; Worcester *v.* Georgia (1832) 6 Pet. 515; see Gibbons *v.* Ogden (1824) 9 Wheat. 1, 210-211; 2 Butler, Treaty-Making Power, §§ 330-333. In Latimer *v.* Poteet (1840) 14 Pet. 4, it was held, that in the exercise of the treaty-power, the national government could even settle disputed boundaries. But there is much conflict of opinion as to whether the treaty-power extends to the cession of State territory without the State's consent. See 5 Moore, Digest of International Law, 171.

on the validity of any treaty which infringes a State's rights.[7] The influence of these dicta is still apparent in a wide spread belief that the treaty-power is limited by the rights of the States,[8] but that this belief is unsound, is indicated by the fact that the earlier decisions have not only never been overruled, but have been repeatedly followed in later cases.[9]

The principal arguments of the State-rights supporters are two. First, they contend that the treaty-power is merely subsidiary, and can be used only to carry out the other powers dedicated to the federal government; hence, it is argued, the President and Senate cannot do by treaty what they have no authority to do otherwise.[10] Second, it is insisted that the States have certain inalienable rights which cannot be infringed by treaties, even though the State should authorize such infringement.[11] The answer to these contentions rests on the fact that the power of the people of the United States is without limit. By their authority the State and federal constitutions were made, and they can make the State constitutions yield to treaties made by the general government, and can even abolish those constitutions.[12] And that the sovereign people have intentionally made the treaty-power paramount to all rights of the States, is indicated not only by the express language of the Constitution,[13] but by the fact that one of the chief objects in forming the Constitution was to create a strong national government with power to make treaties binding on the States.[14] Furthermore, unless such treaties can be made by the federal government they cannot be made at all, for the States are expressly prohibited from making treaties.[15] Both on principle and authority, therefore, the treaty-making power is supreme over State-rights in all instances; and in every case, the sole question for the court is whether the State law conflicts with, and has consequently been displaced by, the treaty.[16]

But it is on this question of construction that the courts have in many instances upheld State laws against apparently conflicting treaties. To do so, they have adopted the rule that they will not impute to the federal government the intent to infringe State laws by treaties

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[7]License Cases (1847) 5 How. 504, 613; Passenger Cases (1849) 7 How. 283, 466; see Frederickson *v.* Louisiana (1859) 23 How. 445, 448; Prevost *v.* Greneaux (1856) 19 How. 1, 7.

[8]See 5 Moore, Digest of International Law, 121, 122, 166, 171, 179.

[9]Hauenstein *v.* Lynham (1879) 100 U. S. 483; Geofroy *v.* Riggs (1890) 133 U. S. 258; see Baker *v.* Portland (1879) 5 Saw. 566.

[10]Jefferson, Manual, 110; Sen. Doc. No. 231, 56th Cong., 2nd Sess. VI, 82; Sen. Raynor of Md. in Cong. Rec., 59th Cong. 2nd Sess., Dec. 12, 1906.

[11]See Corwin, National Supremacy, 124; *cf.* Elkison *v.* Deliesseline (C. C. 1823) 8 Fed. Cas. No. 4366, p. 494.

[12]See Ware *v.* Hylton, *supra*, p. 236.

[13]2 Story, Commentaries on the Constitution (5th ed.) §§ 1836-1838.

[14]See Ware *v.* Hylton, *supra*, pp. 276-277; Chy Lung *v.* Freeman (1875) 92 U. S. 275, 280.

[15]See Hauenstein *v.* Lynham, *supra*, p. 490. But the States have at times made Indian treaties with the tacit consent of the federal government. See Seneca Nation *v.* Christie (1891) 126 N. Y. 122.

[16]2 Butler, Treaty-Making Power, § 359.

unless such intention is very clearly expressed.[17] This narrow canon of construction seems unfortunate. Each nation entering a treaty owes not only good faith in adhering to the spirit of its engagements, but *uberrima fides*;[18] and if a treaty admits of two constructions, one restricted and the other liberal, the latter should be preferred.[19] Treaties are contracts between nations, and since their words are often translations from foreign phraseology, they should not be construed in a narrow special sense imposed upon them by local law unless such restricted sense is clearly intended.[20] In the recent case of *In re D'Adamo's Estate* (1914) 212 N. Y. 214, the court construed a treaty providing that in case a citizen of Sweden die intestate in this country, the Swedish consul "shall, so far as the laws of each country will permit, * * * have the right to be appointed administrator of such estate."[21] The court, applying the narrower rule of construction, refused to grant letters of administration to a consul claiming them under this clause. The decision rests on the phrase, "so far as the laws of each country will permit", which is interpreted to mean that State laws are not to be affected. Such interpretation nullifies the treaty and leaves the consul in precisely the same position as he was before, for he always had the right to administer estates so far as the laws of the States would permit. The effect of this decision is to change the phrase, "so far as the laws *will* permit", to "so far as the laws *now* permit." It is submitted, that under the proper rule of construction, this phrase refers to the laws as they *will* be after the treaty has become the supreme law of the land, and has consequently displaced the conflicting State law which is here enforced.

RIGHTS OF THIRD PARTIES ON CONTRACTORS' BONDS.—In most of our States, the English common law doctrine that where one person makes a promise to another for the benefit of a third the latter may not enforce the promise,[1] has never been accepted to its full extent. A great number of courts hold that a third party who has sustained damage from the breach of such a contract, or who would have benefited by the performance thereof, may, under certain circumstances, recover upon it against the defaulting promisor.[2] There is considerable conflict in these jurisdictions as to just what should be the precise rule determining these exceptions to the English doctrine, but, according to the preponderance of judicial authority, it seems that three things

[17]Estate of Ghio (1910) 157 Cal. 552; Austro-Hungarian Consul *v.* Westphal (1912) 120 Minn. 122; see Lanfear *v.* Ritchie (1854) 9 La. Ann. 96; *In re* Logiorato's Estate (N. Y. Sur. Ct. 1901) 34 Misc. 31. Even the Supreme Court has applied this rule. See Rocca *v.* Thompson (1912) 223 U. S. 317. A persuasive argument for a broader view of this question, is made in an article by Frederic R. Coudert in 13 Columbia Law Rev. 181.

[18]See Tucker *v.* Alexandroff (1901) 183 U. S. 424, 437.

[19]Hauenstein *v.* Lynham, *supra*, p. 487; Geofroy *v.* Riggs, *supra*, p. 271; *In re* Wyman (1906) 191 Mass. 276; Carpigiani *v.* Hall (1911) 172 Ala. 287.

[20]*In re* Lobrasciano's Estate (N. Y. Sur. Ct. 1902) 38 Misc. 415.

[21]37 U. S. Stat. at L. 1487, art. 14, par. 2.

[1]Price *v.* Easton (1833) 4 B. & Ad. 433.

[2]3 Page, Contracts, § 1307.